In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 323

PETE a.k.a. PETER RECZNIK,

Petitioner,

vs.

THE CITY OF LORAIN,

Respondent.

ANSWER BRIEF OF RESPONDENT.

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TABLE OF CONTENTS.

Statement of the Case 1

Law and Argument 3

Conclusion 13

TABLE OF CASES.

Beck v. Ohio, 379 U. S. 89, 85 S. Ct. 223 (1964) 7

Bock v. City of Cincinnati, 43 Ohio App. 257 (1931) 8

Columbus, City of, v. Holmes, 107 Ohio App. 391, 152 N. E. 2d 301 (1958), affirmed 169 Ohio St. 251 ..... 7, 9

Johnson v. U. S., 333 U. S. 10, 92 L. Ed. 436 10

Lakewood v. Smith, 1 Ohio St. 2d 128 (1965) 6

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081 (1961) 4

McDonald v. United States, 335 U. S. 451, 69 S. Ct. 191 (1948) 4, 8, 10

United States v. Rabinowitz, 1950, 339 U. S. 56, 63, 70 S. Ct. 430, 434, 94 L. Ed. 653 10

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

Petitioner in this action, Peter Recznik, is the owner of property located at 1420-1422 Broadway, Lorain, Ohio. The premises at this location consist of a two-story building: the street level being used as a cigar store, the second floor containing rooms. There is no dispute in fact as to who the owner was of the building at the time of the arrest.

On or about June 10, 1965, and shortly before 1:00 A. M. Officer Kochan received information that there was gambling going on at the above-described premises owned by petitioner, Peter Recznik. He received this information from an unidentified informant. Officer Kochan then proceeded to the property located at 1420-1422 Broadway, Lorain, Ohio, and made visual observations to attempt to corroborate the information he had obtained from the informant. Officer Kochan and his

partner left the area of their normal patrol to do this. They observed at the above address an unusual amount of traffic and kept the address under observation for a short time.

Officer Kochan, in the record, indicates that there were roughly 20 to 25 cars in the front on the premises and an equal number in the rear. (Page 8 of the Record, lines 13 and 14.) This would be an unusually high number of cars for this area, and Officer Kochan, who is a veteran police officer and extremely familiar with this area, was aware of this.

The officers drove around the area keeping it under observation and they noticed that the blinds were open a little and they could see someone looking out. Mr. Recznik, the petitioner, came out and came downstairs and walked over to the cruiser. Officer Kochan asked the petitioner what was going on and he indicated there was nothing going on upstairs. Officer Kochan admonished him that there had better not be, according to Officer Kiensle, and that they would be back. The officers left and returned fifteen or twenty minutes later.

Then, they observed persons going into the building and Officer Kochan and his partner, based on the information of the informant and on personal observations and knowing that their surveillance and presence had been discovered, walked to the second floor where a large gathering appeared to be; and were permitted to enter and walk around and observe people playing cards. It should be pointed out, that from all indications, the door was not locked and no force was required.

Officer Kochan then proceeded to walk towards another room but was met by the petitioner and was advised that he could not enter the other room. While the officer was talking to petitioner, he observed over petitioner's

shoulder and through a partially open door, a dice game going on in the other room, and heard remarks being made within the other room which indicated that a dice game was going on. He thereupon informed the petitioner that he and the other occupants of the room were under arrest. A search of the premises was then conducted and the gambling paraphernalia was confiscated.

The petitioner was tried before a jury on three counts and convicted on three counts; the conviction appealed to the Court of Common Pleas. The Court of Common Pleas reversed the conviction of the lower Court on the third count, this case being Lorain Municipal Court Case No. 109285. The Court of Common Pleas sustained the decision of the Lorain Municipal Court on the remaining two charges. The decision of the Court of Common Pleas was appealed to the Court of Appeals, Ninth District, and the judgment of the Lorain Municipal Court and the Court of Common Pleas was sustained by the Court of Appeals. The case was then appealed to the Supreme Court of the State of Ohio and that Court refused to certify the case after it had considered both the briefs and oral arguments.

LAW AND ARGUMENT.

This case originated in the Lorain Municipal Court and has been reviewed on appeal three times, first by the Court of Common Pleas, Lorain County, second by the Court of Appeals of the Ninth Judicial District and third, by the Supreme Court of the State of Ohio.

The only true constitutional question involved in this case is the much overworked question of search and seizure. This question has been very carefully studied by this Court. The question even in the area of search and seizure is one of fact more than of law.

The law and the facts in this case as have been pointed out have both been re-worked four times. The question of whose testimony the Court wishes to believe or a jury wishes to believe is based on many things as the trial record is often silent on such things as manner of response to questions, sincerity and believability.

The jury chose, along with the four lower Courts, to believe Officer Kochan.

The writer would believe that all the Courts accept and follow the exclusionary rule set down by this Court in the case of *Mapp v. Ohio*, 367 U. S. 643, 6 L. Ed. 2d 1081. The question of the reasonableness of a search without a warrant is more generally a question of fact. It must in the first instance be reviewed by the original trial Court.

As to the question of search and seizure it would seem important to note the differences between this case and the cases such as *Mapp v. Ohio, supra,* and *McDonald v. United States,* 335 U. S. 451, 69 S. Ct. 191.

In *McDonald v. United States, supra,* the officers heard adding machines, entered through another party's window, then entered the hallway, and saw by looking through a window over the door, activity taking place. It was the indication by this Court in this opinion that the mere hearing of adding machines would not give rise to inference of any illegal activity. But this case differs from *McDonald v. United States, supra.* In the case before this Court; the officers had an informant. The officers reenforced the information they had received from their informant by going to the address where the illegal activity was supposed to be taking place and observing a large number of cars in the area, and people entering the building of petitioner.

The entrance took place at approximately 1:00 A. M., the officers had an informant; they have their own observa-

tions as to the amount of unusual traffic and activity about the area; and they had been discovered which is very important. Then the Petitioner comes down the stairs and talks with them and the police officers leave. Had they attempted anything at that moment, it in all probability would have resulted in no discovery because the petitioner was on notice of their presence. The occupants had undoubtedly been warned of the officers' presence and the officers then proceeded to leave and return fifteen or twenty minutes later, and further observed people entering the building, and they proceeded to investigate further. They went up the stairs, according to their testimony, entered the premises which at that point had taken on, from the amount of people, a public appearance. There was no attempt to stop the officers until they got near the gambling activity.

It would be only reasonable to infer that the Petitioner would not wait around indefinitely for the police officers to return with a search warrant; that the Petitioner was aware that the police officers were suspicious and would certainly have taken reasonable precaution so that the illegal material would not have been available and the activity would not have been going on had the officers gone to get a search warrant. Petitioner has had substantial experience with police officers and would be well aware of the time it would take to get a search warrant. Had the officers gone to a magistrate, presented the information which they had, and returned with a search warrant, they would have, with any luck at all, arrived some several hours, at its best, later; and would have undoubtedly found nothing. As I have indicated previously, petitioner, from his past experience, is well aware of police procedures.

Once discovery of the police officers' presence was made by the petitioner, the officers had only two choices: (1) To act on the basis of the information from their informant and on their own observations of the unusual amount of traffic and people entering the building, or (2) Simply forget about the matter. Because as has been previously stated, it certainly would not stretch anyone's imagination to believe that the petitioner would certainly have concealed his illegal activity by the time the police officers had returned. To say that once their presence had been discovered it was practicable for them to get a search warrant, would be to completely disregard procedures followed by individuals in the gambling business.

Petitioner further cites the case of *Lakewood v. Smith*, 1 Ohio St. 2d 128. In this case it was simply a question of the officer being permitted to enter the premises and then intercepting a telephone call which led to the obtaining of evidence against the defendant. The Court held that a person does not waive constitutional immunity from unreasonable search nor does he thereby consent to search by permitting the officer to enter the premises, and a police officer entering private premises by consent without a search warrant may not proceed to intercept incoming telephone calls. The *Lakewood v. Smith, supra,* case would not appear to be applicable because (1) no telephone calls were intercepted, and (2) the search in the case presently before this Court was incident to the arrest and not before the arrest. The actual physical search took place after the arrest. The writer might further point out, in that for all apparent reasons the premises where the search and arrest took place were open to the public; that a considerable amount of traffic was there; that the officer saw people walking into the building without any formality of admittance.

The petitioner cites *City of Columbus v. Holmes,* 107 Ohio App. 391, 152 N. E. 2d 301 (1958):

> "1. Where no misdemeanor is committed in the presence of a police officer there is no authority to make an arrest, on a mere suspicion or belief that a misdemeanor has been committed, without a warrant."

It should be pointed out that in this case before this Court there was no arrest made until the officers had actually heard and saw the violation being committed, and then they had not only the right but duty to make an arrest.

On page 10 of the Petition, petitioner maintains that the officers had ample opportunity to obtain a search warrant and that without such warrant the officers had no right to make entry into the upstairs suite.

As we have previously pointed out, once the presence of the police officer is discovered, if he had sufficient information to get a search warrant as to gambling activity going on in a certain place at a certain time, he might as well forget about it, because no one is going to stand around and wait the several hours that is required to arouse a magistrate, give him the information, get a search warrant typed and return to the scene. The discovery by the petitioner of the presence of the officers certainly made immediate action necessary.

The petitioner in support of his contention as to obtaining a search warrant relies heavily upon *Beck vs. State of Ohio,* 3 O. Misc. 71, 379 U. S. 89, 85 S. Ct. 223. In the *Beck vs. Ohio, supra,* case the officer stopped the defendant on the basis of pictures of defendant, that he knew he had a record prior to conviction with respect to clearing house slips. The Court found that this was insufficient evidence and that if the arrest was proper, then

the search would have been proper, and with this proposition we find no quarrel.

In this case before the Court the officer heard and saw the commission of crime and made an arrest based on the actual observance of that crime. That he entered the apartment based on information received as well as having personally observed activity corroborating the information received from an informant. They were further discovered outside prior to making an attempt to enter the premises, which made some sort of immediate action necessary.

Petitioner further, on page 11, attempts to contend that evidence presented in the case before this Court was stronger than that involved in *McDonald vs. United States, supra.* Petitioner raises the question of the two addresses to his buildings. It should be again pointed out that this whole building was owned by petitioner and subject to his use and being used for the purposes which the informant of Officer Kochan indicated they were being used for.

The fact remains that the officers entered the building where they expected to find activity, and they saw activity with their own visual observation to corroborate the information received from the informant.

There is no attempt to quarrel with the law of the cases cited by petitioner, it is simply that the facts in the cases cited are substantially different.

Petitioner further cites *Bock v. City of Cincinnati,* 43 Ohio App. 257 (1931). In the *Bock v. City of Cincinnati, supra,* case, the officers who made a search without the slightest reason or probable cause to make the search, simply went in and picked up a note pad of defendants, and shook out some race horse slips. The facts in this case again bear no resemblance to the case presently before

this Court. There were no informants involved, no personal observations based on the information by the informant to corroborate his information, as there is in the present case before this Court.

Petitioner cites the case of *City of Columbus vs. Holmes,* 107 O. App. 391, 152 N. E. 2d 301 (1958). The question involved was of an arrest for disorderly conduct and for failing to obey a police officer in the discharge of his duty. The defendant was found innocent of the disorderly conduct charge, but guilty of obstructing or failing to obey the police officer, and dealt with the question that if she was not acting disobediently, if she, in fact, had the right to resist the officer arresting her. Also involved was the question of ownership of private property, but nothing in the facts are similar to the case before this Court. The Court held that any unlawful interference with the rights of personal property may be resisted, and every person has the right to resist an unlawful act, and an officer has no right to make an arrest for a misdemeanor on a mere suspicion that a misdemeanor has been committed without warrant. None of these facts are present in the case before this Court. There was no attempt to settle property rights, and the arresting officer actually saw the violation and heard the violation being committed, and he certainly had the right and duty as a law enforcement officer to make an arrest.

The question of the reasonableness of search must also be taken in light of fact present at the time and as this Court has previously stated, there can be no fixed formula as to reasonableness of searches:

> "Because there can be no fixed formula, we are admittedly met with recurring questions of the reasonableness of searches, 'but less is not to be expected when dealing with a Constitution, and, at any rate,

(reasonableness) is in the first instance for the (trial Court) to determine.'" *United States vs. Rabinowitz*, 1950, 339 U. S. 56, 63, 70 S. Ct. 430, 434, 94 L. Ed., 653.

The duty of law enforcement is not a cat and mouse game, it is a deadly serious job of maintaining order in our society.

It is necessary that a police officer have some reasonable latitude based on sufficient probable cause, to make a search. Here an officer had an informant, then tried to back up the information of the informant by his own personal observations and those of his partner. It is the respondent's contention that with the probability of the concealment of the evidence and the illegal activity after the officers were discovered outside, that they were justified in pursuing the course that they followed.

This is not the situation whereas in *McDonald vs. United States, supra,* they simply heard adding machines and then commenced to make an entry. Here, in this case before the Court, the officers had the observations of the unusual traffic and activity at the building of petitioner and they had the information of their informant.

This case differs substantially again from the *Johnson vs. United States,* 333 U. S. 10, 92 L. Ed. 436, case which is cited by the petitioner, where the officers had an informant and smelled opium outside the room which they later searched; and there was no reason why a man could have been brought outside until a warrant was obtained since there was no belief that they had knowledge that they were under surveillance or had any suspicions that they were under surveillance.

Further, in the case at hand, there was access to this apartment to all those who seemed to want to go in and out.

We respectfully submit, that the officers had a duty on that evening to act as they did, based on the information of their informant, which was corroborated by their own observations.

We believe that the officers would be proper in reasonable belief that once told gambling was taking place and observing this type of traffic, to assume that their information was completely correct, and once they were observed outside the building, it would become only a question of time until the proceedings upstairs would be wound up; and the evidence would not have been available had the officers gone to obtain a warrant.

Therefore, we respectfully submit that the officers had probable cause to enter the apartment without a search warrant at that time; that the search which followed in which a majority of the gambling paraphernalia was uncovered took place after Officer Kochan observed and heard the gambling going on while talking to petitioner. He thereupon placed the petitioner under arrest and proceeded to search the immediate area of rooms to confiscate the gambling paraphernalia, the dice tables as evidence.

There could be no serious argument that the officers had not only the right but the duty and the obligation to make the arrest.

As has been previously stated and respondent would state again, this is a question of fact and the application of existing law in this case.

This Court has on previous occasions, as has already been pointed out, indicated there is no fixed formula when it comes to the question of search and seizure. There is no attempt on the part of the City of Lorain to quarrel with the existing interpretation by this Court on the question of search and seizure.

It is the respondent's contention that the facts as they appeared in this case, are different than those in the cases cited by the petitioner; and that the actions of the police officers involved are justifiable and proper.

Petitioner's last contention is that he did not receive a fair trial in that the Lorain Municipal Court permitted evidence to be produced concerning the third charge by improperly displaying 16 boxes of tip boards during the trial so that it could prejudice the jury.

There was substantial and different evidence used to convict the petitioner on the remaining two counts. What petitioner is attempting to suggest is that if evidence is present in a courtroom which pertains to the one of several counts and the petitioner is later either found not guilty or the conviction reversed on that count, that the defendant has been prejudiced as to a conviction on the other counts even if there is more than enough adequate and separate evidence used to convict on the other surviving counts.

If this were the law, it would mean that a defendant could not be tried on more than one count without risking the possibility of later having to be re-tried if conviction of one of the counts were later reversed.

Petitioner's proposal would certainly put an unreasonable and unwarranted burden on those charged with the duty of prosecuting criminal charges. Respondent knows of no authority for this and petitioner has continuously failed through all of his briefs, to cite any authority for his contention. It would seem that there is no compelling argument to this Court that it should consider this question at this time.

CONCLUSION.

Petitioner, on four occasions by four different Courts prior to arriving here, has had his case reviewed. It is strongly contended that his rights have been protected; that the authorities cited by the petitioner vary substantially in the facts from those presented in this case, and the authorities cited are not applicable to this case.

It is respondent's contention that the police officers' conduct was proper and justified as to the facts at the time of the arrest of petitioner.

Petitioner has had his rights adequately protected through the various reviews.

There is nothing new or novel or of such great interest or magnitude as to require this great Court to hear this case.

It is therefore respectfully submitted that Petitioner's petition for a writ of certiorari be denied, and the conviction of petitioner be permitted to stand.

Respectfully submitted,

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Attorney for Respondent.